INTERNATIONAL SAND & GRAVEL CORP.


Affirmed.


BLM properly declines to approve the sale proponent's proposed access route for a mineral materials sale pursuant to the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (1994), when BLM's chosen alternative route will disturb less land and avoid the potential adverse impact on a nearby residential community from noise and air pollution, and when BLM has considered the greater cost of that route to the proponent, and the proponent fails to demonstrate that BLM acted in an arbitrary and capricious fashion, or contrary to any applicable Federal statute or regulation.


OPINION BY ADMINISTRATIVE JUDGE TERRY

The International Sand & Gravel Corporation (ISGC) has appealed from a March 20, 1997, decision of the Las Vegas District Office, Nevada, Bureau of Land Management (BLM), approving its application to purchase mineral materials, N–59688, from public lands situated in Clark County, Nevada, and authorizing removal by an alternative access route.

ISGC filed an application for a mineral materials sale on March 7, 1995, later revising it by letter dated April 11, 1995. ISGC thus sought to purchase 200,000 cubic yards of sand and gravel from 40 acres of public land situated in the W½SW¼NW¼ sec. 17 and E½SE¼NE¼ sec. 18, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada. That area is about 2.25 miles south of the corporate limits of the city of Henderson, Nevada.
ISGC stated that it eventually intended to mine about 700 acres of public land in that area. 1/

ISGC originally sought to access the proposed materials site from the north, proceeding south along about 5.75 miles of existing roads across private lands through the outskirts of the City from sec. 30, T. 22 S., R. 63 E., across sec. 31 of that township, and then across public lands through secs. 5, 6, 8, and 17, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada, to the proposed site. 2/ It later changed its proposal on January 30, 1996, seeking to access the proposed site from the northeast, from a point southeast of its original proposed starting point, but still within the City's corporate limits. ISGC thus proposed to proceed west and then south from I–95 along about 4.75 miles of existing and new roads across private lands through the outskirts of the City in sec. 35, T. 22 S., R. 63 E., and secs. 2 and 3, T. 23 S., R. 63 E., and then across public lands through secs. 4, 5, 8, and 17, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada, to the proposed site. The turn-off from I–95 is situated about 5 miles from the starting point of ISGC's original proposed route in sec. 30, T. 22 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada.

BLM later advanced an alternative to ISGC's revised proposed route, which would access the proposed materials site from the southwest, proceeding from I–95 along about 5.5 miles of existing roads across public lands, well south of the corporate limits of the City. This route would

1/ The record indicates that the overall area in which ISGC seeks to extract and remove sand and gravel, now and in the future, is part of what has been unofficially designated as the 14,100–acre "Henderson Community Pit." (Memorandum to Area Manager, Stateline Resource Area, Nevada, BLM, from Environmental and Planning Coordinator, Stateline Resource Area, dated Mar. 24, 1995, at 1.)

2/ ISGC proposed another alternative route, also through the outskirts of the City and south across public lands situated in secs. 5, 8, and 17, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada, to the proposed materials site. The first part of this route followed I–515 and then "College Drive," a four–lane highway through the outlying residential area of the City, known as "Mission Hills." ISGC expected that the use of College Drive would meet with little opposition from current or future homeowners in the nearby residential community. It noted, however: "If the homeowners ever do protest, we would be perfectly willing to build sound barrier walls." (Letter to BLM, dated Apr. 19, 1995, at 1.) It also later offered to pave the remaining unpaved segment of College Drive, which was about ½ mile long. (Letter to City, dated Aug. 31, 1995.) This entire proposal was eventually abandoned, when the City, in the face of opposition by local residents and a denial recommendation by its Planning Department, refused ISGC's request for a permit to use College Drive.
run southwest from I–95 to the intersection with an R.S. § 2477 road, designated "A68Q," in the Eldorado Valley, in sec. 34, T. 23 S., R. 63 E., and then proceed northwest across public lands through secs. 17, 20, 21, 28, 33, and 34, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada, to the proposed site. The turn–off from I–95 is situated about 5.75 miles from the starting point for ISGC's revised proposed route, at the intersection with I–95 in sec. 35, T. 22 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada.

ISGC anticipated that, during active mining operations, its access route would be traversed by about 12 trucks per hour, going to and from the materials site, resulting in a total of about 120 trucks using the route each 10–hour day (or about 96 trucks each day, based on its revised 8–hour day). (Letter to City, dated Aug. 31, 1995; see City Planning Department Staff Report, Project Information (Project Information), dated Nov. 28, 1995, at 1; Statement of Reasons for Appeal (SOR) at 3.)

Following extensive consideration of ISGC's application, including completion of an Environmental Assessment (EA) (No. NV–054–96–004) on March 13, 1997, BLM approved that application in its March 1997 decision, limiting the purchase of sand and gravel to 100,000 cubic yards, over a 1–year period of time. However, based on its environmental review and public comment, BLM required ISGC to use its alternative access route for transporting the necessary mining and related equipment and extracted sand and gravel to and/or from the materials site, rather than the one proposed, and preferred, by ISGC. It is from this specific BLM decision, declining to approve appellant's proposed access route, that ISGC then appealed.

In its SOR, appellant contends that BLM's imposition of the alternative access route will render it "impossible for anyone to operate th[e] [sand and] gravel deposit [at issue here]," and thus preclude any mineral materials sale by BLM. (SOR at 3.)

Appellant notes first that mining and related operations at the materials site are already rendered economically difficult, by virtue of the fact that there is no water available at the site which could be used to wash the extracted sand and gravel, thus rendering it suitable for immediate sale to the concrete industry, its intended market. (SOR at 1.) It concludes that the 6.5 miles added to the hauling distance, between the site and the City, will significantly increase its overall mining and related costs, making it unprofitable to undertake operations:

[A]t [about] a dollar a ton for the extra cost for hauling based on 200 ton an hour or 1600 ton a day, [the alternative route] would add $1,600.00 a day to our cost. In 30 days, the extra cost for hauling would approach $48,000.00 and in 1 year this supposedly minimal cost would approach $600,000.00. [3]

3/ Given production of 1,600 tons each day, or 584,000 tons each year, this would mean an actual increase in hauling costs of $584,000 (not $600,000) per year, were production to occur over 365 days.
It further alleges that the extra distance, which places appellant 6 miles further from the City than three other sand and gravel producers in that area, would also place it at a competitive disadvantage. Id. at 1.


BLM declined appellant's proposed access route because the alternative route would disturb less acreage and might reduce the adverse impacts on residential areas north of the proposed route from noise and air pollution generated by trucks accessing the materials site. (Decision at 1.) In reaching this conclusion, BLM relied on its EA, which had addressed the potential environmental consequences of approving appellant's mineral materials purchase application, and thus authorizing the proposed materials sale, and alternatives thereto, including the alternative access route. In his Mar. 14, 1997, Decision Record/Finding of No Significant Impact (DR/FONSI), the Assistant District Manager, Nonrenewable Resources, Las Vegas District, approved the proposed materials sale, including the alternative access route. He also found that no significant impact would result from such approval, which meant that BLM was not required, by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to prepare an environmental impact statement. The DR/FONSI was immediately followed by the March 1997 decision at issue here.

Access [by the proposed route] would be by a combination of constructed and existing roads * * *. The existing roads would be upgraded for vehicle use. Approximately 1.75 miles of new road would be constructed south of the Mission Hills Detention Basin and Channel. The road would be screened from view, for the most part, by these structures. It would also be away from any housing development which might occur.

* * * * * * *
The alternative route would also require upgrading. However[,] less acreage would be affected during the upgrading and no new road building would be required. Use of this road would cut down on noise and air pollution that might impact the homes in the Mission Hills area. It would add slightly to the hauling costs due to the longer distance trucks would have to travel. These costs would be negated or lessened by the fact that no new road would need to be built. All other impacts appear to be the same as in the proposed action.

(EA at 1–2.)

In order to overcome BLM's decision rejecting appellant's proposed access route pursuant to its discretionary authority, appellant is generally required to demonstrate that the decision was arbitrary and capricious, and thus not supported on any rational basis. Utah Trail Machine Association, 147 IBLA 142, 144 (1999); Glenn B. Sheldon, 128 IBLA 188, 191 (1994).

The burden is upon an appellant to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision generally is not supported by a record showing that BLM gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made.

Quoting Utah Trail Machine Association, 147 IBLA at 144 (authorized use of new trail); Mountain Home Highway District, 147 IBLA 222, 226–27 (1999) (road right–of–way); Glenn B. Sheldon, 128 IBLA at 191 (mineral materials sale); Larry Griffin, 126 IBLA 304, 306! 07 (1993) (closure of existing road to motorized use); see also Echo Bay Resort, 151 IBLA 277, 281 (1999) (mineral materials sale). Normally, in order for us to hold that it acted in an arbitrary and capricious manner, it must be shown that BLM

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before [it] or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983). Appellant's burden will clearly not be satisfied simply by expressions of disagreement with BLM's analysis and/or conclusions. Tom Cox, 142 IBLA at 258; Larry Griffin, 126 IBLA at 308.

Appellant has failed to demonstrate that BLM erred in its assessment that there will be a greater adverse impact to the human environment from the proposed access route, from the standpoint of either the disturbance of more land or the higher likelihood that noise and air pollution will affect the nearby residential community of Mission Hills.

153 IBLA 299
There is no doubt that the surface disturbance would involve more acreage in the case of the proposed route (about 6.89 acres of new roadway, plus about 1.8 acres disturbed by widening 1.5 miles of existing roadway by 10 feet) versus the alternative route (about 6.36 acres disturbed by widening 5.25 miles of existing roadway by 10 feet). See "Map 1" attached to EA; BLM's Section 7 Biological Evaluation, dated June 28, 1996, at 1–2; Memorandum to District Manager from FWS, dated Nov. 7, 1996, at 3; EA at 1 ("existing roads would be upgraded [in the case of the proposed route]"); 7. In addition, the disturbance would be greater because the alternative route would only involve improving existing roadway, whereas the proposed route would create close to 2 miles of new roadway.

It also cannot be doubted that there would be a higher likelihood, in the case of the proposed route, that noise and air pollution (primarily in the form of particulate matter), which will inevitably be generated by the passage of about 96 trucks each day, will affect the nearby residential community. See EA at 4 ("Building, upgrading and travel over [new and] existing roads by heavy equipment would *** generate dust"). The proposed route is situated within a mile or less of residential areas on the outskirts of the City. See Letter to BLM from appellant, dated July 28, 1996 ("The road is generally 1,500 [feet] from the nearest residence"); Letter to BLM from City, dated June 13, 1996, at 1-2 ("The route is located within ½ mile[s] of existing homes, and bisects an undeveloped area that is zoned for low density residential use. *** The dust, noise, and traffic associated with a haul route [will] have a serious negative impact on nearby residences."); Letter to BLM from Citizens of Paradise Hills/Mission Hills, dated June 4, 1996, at 1–2. While these areas appear to be currently sparsely populated, the City has stated that "[t]his portion of

---

5/ We base our calculation of the area of new disturbance on the fact that the new road would be 10,000 feet long and 30 feet wide, and thus 300,000 square feet (or about 6.89 acres). See Letter to U.S. Fish and Wildlife Service (FWS) from District Manager, Las Vegas District, Nevada, BLM, dated July 8, 1996, at 1; ("[S]ince several gravel pits will be using the road, I anticipate that it may need to be up to 30 feet wide to allow for easier passing of the trucks"); BLM's Section 7 Biological Evaluation, dated June 28, 1996, at 1–2; Letter to BLM from Harvey Merrell, Consulting Geologists, dated Feb. 15, 1996.

Given BLM's original desired width of 20 feet, the area of disturbance would be 4.59 acres. (Letter to FWS from District Manager, dated July 8, 1996, at 1.) We also note, based on a report submitted on behalf of appellant, that it expected that the new road would be 16 feet wide, thus resulting in a disturbance of 160,000 square feet (or about 3.67 acres). (Letter to BLM from Harvey Merrell, Consulting Geologists, dated Feb. 15, 1996.) However, BLM clearly favored a greater width, and has incorporated it into its EA and subsequent March 1997 DR/FONSI and final decision.

153 IBLA 300
the [Las Vegas] [V]alley is continuing to grow rapidly." (Letter to BLM, dated May 30, 1995, at 1–2; see "Map 1" attached to EA.) BLM also noted in its EA that "[a]ctions on private lands such as development * * * [are] anticipated to continue[.]

Housing will fill in available open space on lands managed by the City of Henderson by the year 2000. These lands are north of the action area." (EA at 4; see also Letter to BLM from the City, dated June 13, 1996, at 2 ("Because of the tremendous growth rate that Henderson is experiencing, it is reasonable to expect additional development along the proposed haul route during its use"); Project Information at 1 (areas zoned residential since 1969); BLM's Section 7 Biological Evaluation, dated June 28, 1996, at 3 ("Current development of private lands in Henderson * * * [is] expected to continue"). Thus, the potential impact on these residential areas from the proposed route will only increase with time.

By contrast, the alternative route is situated, at its closest point, approximately 3 miles from these residential areas. Despite the similarities in the two routes, we cannot find fault with BLM's decision to minimize, where possible, the unavoidable impacts of its approval of appellant's mineral materials purchase application.

Nor are we convinced that BLM failed to appreciate the consequent impact of disallowing appellant's preferred access route in favor of its alternative route. BLM was well aware that increasing the hauling distance by 6.5 miles would result in increased costs for appellant. The total increase in anticipated costs for its 1-year operation is projected by appellant, on appeal, to be $600,000. We find no reference to a particular cost figure, developed by BLM, in the record. However, it cannot be denied that appellant, which was aware of BLM's alternative route presumably since the Preliminary EA was distributed to interested parties on May 10, 1996, could have provided BLM with its cost estimate of the increased hauling costs attributable to the alternative route. Apparently, it did not.

Although appellant disputes BLM's assertion at page 2 of the EA that use of the alternative route would only "add slightly to the hauling cost" and that such additional cost would be offset by the fact that no new road would need to be constructed, the mere allegation of increased expenses does not establish error in BLM's selection of the alternative route, particularly in light of BLM's reliance on health and safety concerns for selecting the alternative route.

6/ We accept the fact that the extra hauling distance of 6.5 miles will increase its hauling costs by "approximately a dollar a ton," in the absence of any contrary proof by BLM. (SOR at 1.) We also accept that this translates into an increase in total costs of $600,000, based on the production of 600,000 tons of sand and gravel from the subject materials site. However, since total production under the sale contract at issue here will be only 100,000 cubic yards, or about 194,175 tons (based on 0.515 cubic yards of sand and gravel per ton, see M.L. Petersen, 151 IBLA 379, 392 (2000)), the added cost to this particular contract, which will last 1 year, will be about $194,175.

153 IBLA 301
When BLM, by rejecting a right-of-way application, acts to advance a land management objective in a situation where the applicant has a feasible alternative, its decision will not be overturned because the alternative is problematic, or even more expensive. Kirk Brown, 151 IBLA 221, 226 (1999), and cases cited therein. Absent evidence to the contrary, we must conclude that that is the situation here. Id. at 226–28.

Appellant has failed to carry its burden of proving, by a preponderance of the evidence, that BLM acted in an arbitrary and capricious fashion. Nor has it made any effort to show that BLM acted contrary to any applicable Federal statute or regulation, and we discern no violation.

We, therefore, conclude that the District Office, in its March 1997 decision, properly declined to approve appellant's proposed access route for the purchase of mineral materials from public lands situated in secs. 17 and 18, T. 23 S., R. 63 E., Mount Diablo Meridian, Clark County, Nevada.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.